UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **Case No. 8:03-CR-77-T-30TBM**

HATEM NAJI FARIZ
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MOTION TO PRECLUDE OR DELAY THE ADMISSION OF THE ALLEGED ATTACKS BASED ON DELAYED PRODUCTION OF *BRADY* MATERIAL AND MEMORANDUM OF LAW IN SUPPORT

Defendant, Hatem Naji Fariz, by and through undersigned counsel, and pursuant to the Fifth and Sixth Amendments to the U.S. Constitution; *Brady v. Maryland*, 373 U.S. 83 (1963), *Kyles v. Whitley*, 514 U.S. 419 (1995), and their progeny; and Federal Rule of Criminal Procedure 16(d), respectfully requests that this Honorable Court preclude, or delay, the admission of any evidence concerning the alleged attacks, including but not limited to Overt Act 14. As grounds in support, Mr. Fariz states:

1. On April 25, 2005, Mr. Fariz filed his motion to preclude the evidence of the alleged attacks, or alternatively, for an order of proof concerning such evidence. (Doc. 982). Mr. Fariz's argument was based, in large part, on the irrelevance and unfair prejudice of the presentation of this evidence, particularly absent a showing that each of the four Defendants before the Court had knowingly and willfully joined the Count One and Count Two conspiracies in which others would commit murder.

2. On May 10, 2005, Mr. Fariz filed his motion for relief concerning the production of the Israel evidence. (Doc. 1037). In that motion, Mr. Fariz addressed the

course of production of the Israeli materials and its effect on defense counsel's ability to be prepared to meet the evidence concerning the alleged attacks in this case.

3. The instant motion addresses the delayed production of *Brady* material concerning the alleged attacks. Specifically, Mr. Fariz addresses *Brady* material that the government produced to the defense on April 18, 2005.

4. This information shows that on September 17, 2003, an Assistant United States Attorney ("AUSA") and the case agent involved in this case interviewed one of the individuals alleged to have participated in the attack that occurred on February 14, 1992 (Overt Act 14).[1] This individual is serving three life sentences in Israel. During this interview, the alleged attacker made a number of statements exculpatory to the charges in this case, including stating that "at the time of the terrorist attack against the Israeli soldiers that he was not formally part of any specific terrorist organization." (FBI-302, transcribed on Oct. 10, 2003). The government has alleged in the original and superseding indictments that this individual, along with three others named in the indictment, were associated with the Palestinian Islamic Jihad ("PIJ") when they committed the attack (Doc. 636 at 20 (Overt Act 14)), and that the Defendants in this case, in turn, are ultimately culpable as members of the PIJ Enterprise as alleged in Count One.

5. The individual further stated that:

> [H]e did not know and has never had any relationship with anyone named SAMI AL-ARIAN. However, [he] did not deny that he may have received

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[1] This attack was alleged in the original indictment as Overt Act 11.

> money from someone named SAMI AL-ARIAN in Tampa, Florida. [He] specifically stated that 'It is possible that this happened.' [He] stated that the money would come into his account while he was in prison, *but since he was in prison he would not know who sent the money or where it came from.* [He] stated that it is common for people outside the territories to hear about his terrorist activities. Since these people know he has a family they would send him money. [He] stated that this was 'very common'.

(Emphasis added). The government has alleged in the original and superseding indictments that Sami Al-Arian caused four wire transfers to be sent to bank accounts in the names of "spouses or relatives of recently convicted PIJ terrorists serving sentences in Israeli jails for their participation in a terrorist attack on or about February 14, 1992 . . . ." (Doc. 636 at 23 (Overt Act 27)).

6. The government did not provide this FBI form 302 recording the statement to the defense until April 18, 2005, well over one and a half years after taking the statement. While the government may have produced the statement 30 days before trial, Mr. Fariz contends that the government did not meet the Court's requirement that it be provided "at an appropriate time." (Doc. 152).

7. The government delayed producing the statement despite the fact that the defense has repeatedly and specifically requested *Brady* materials, and specifically requested that the *Brady* deadline be set earlier than 30 days before trial. Indeed, Mr. Fariz asserted that 30 days would be inadequate for the defense to respond to materials received so close to trial. *See, e.g.,* Doc. 511, Motion for Exculpatory and Impeaching Evidence at 1, 7 (filed on April 16, 2004) (requesting the immediate production of *Brady* material including "All

evidence, including statements, 18 U.S.C. § 3503(a) depositions, form 302s, handwritten notes, or documents of any kind which contradict any of the allegations in the Indictment.").

8. The Court, moreover, did not set an earlier deadline, based on the government's representations to this Court and the parties that *Brady* materials would be provided in a timely fashion, meaning in sufficient time for the defense to use the materials. *See, e.g.,* Doc. 523, Government's Response to Defendant Fariz's Motion for Exculpatory and Impeaching Evidence, at 13-14 & n.5. On April 29, 2004, the government stated in response to Mr. Fariz's specific request for the immediate production of exculpatory statements and form 302s that:

> To the extent that this constitutes material information favorable to Defendant Fariz on the issue of guilt or punishment, the government understands and accepts its obligation to search for and produce exculpatory information, and if there is any Brady information, the government will produce it.[] This affirmation in itself presents a sufficient basis for denying Defendant's motion to compel.

Id. at 13-14 (citation and footnote omitted).

9. This Court declined to amend the Second Amended Discovery Order deadline for *Brady* materials, indicating that:

> As to the timing of the Governments disclosure of Brady and Giglio matters, the Government has assured the court and the Defendants that it fully understands its disclosure obligations under those authorities and will respond in accordance with the court's Pretrial Order. *It further has assured that, for those matters so required to be disclosed and for which it appears additional investigation by the Defendants may be required, earlier disclosure will be made.* At a minimum, Brady requires the prosecution to disclose exculpatory evidence in time for its effective use by the defense.... *It goes without saying that Brady does not contemplate or permit the government to sandbag defendants to the last possible moment before making*

> *the required disclosures*. Given the voluminous discovery in this case and the burden it imposes on the defense to adequately prepare, the Government is encouraged to begin making its Brady disclosures well in advance of the court imposed deadline. . . .

Doc. 544, Order of May 26, 2004, at 5 n.5 (citations omitted) (emphases added).[2] The government, despite having this Form 302 in its possession, waited nearly an additional eleven months prior to producing the statement to the defense.

10. This Court recognized that information concerning the alleged attacks in Israel was critical to the defense, and that due consideration had to be given to the time and expense involved in investigating allegations of activities that occurred in the Middle East. Specifically, Magistrate Judge McCoun stated:

> Investigation by the Defendants of these occurrences in Israel obviously can not be accomplished without great difficulty and considerable expense. . . . [G]iven the volume of other discovery that must be reviewed by the Defendants and the difficulties inherent in any investigation in Israel, considerations of fairness and the Defendants' need for effective investigation to adequately prepare for trial dictate that further disclosure by the Government be made as to this count.

(Doc. 428 at 6) (footnotes omitted).

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[2] Subsequently, on September 23, 2004, counsel for Dr. Al-Arian wrote the government a letter requesting "exculpatory materials in a timely manner," including "all evidence in the possession, custody and control of the government that is inconsistent with the government's theory of the case" and "any information shared with the United States by any intelligence or law enforcement agency that is in any way exculpatory regarding Dr. Al-Arian." (A copy of this letter is attached to the government's motion in limine (Doc. 972)). The government responded on October 25, 2004, stating in response to the latter request that "[t]o the extent such records exist, you have been provided with all exculpatory information." (A copy of this letter is attached to Mr. Fariz's motion in limine (Doc. 982)).

11. Members of Mr. Fariz defense team spent considerable time and money preparing for and traveling to the Middle East during October 2004, in order to investigate the charges in this case. Mr. Fariz's defense team did not have the benefit of this individual's statement, despite the fact that it was made directly to the prosecution team in this case over a year before Mr. Fariz's team traveled to Israel. Instead, the government represented that this individual was a member of the PIJ when the attack occurred; the documents that the defense had received and was able to review did not contain affirmative denials of this critical fact.[3] This new statement calls into question the government's representations about this attack, as well as the other attacks alleged in the indictment.[4] This individual is being held on a life sentence by the Israeli authorities; counsel for Mr. Fariz would have needed

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[3] Additionally, Mr. Fariz would note that he was still receiving Israeli materials pertaining to this individual, or to the alleged attack in Overt Act 14, as of April 12, 2005, after the defense requested documents that had not yet been produced by the government. As a particular example, Mr. Fariz did not receive copies of the arrest warrant for this individual for committing murder and being a member of an unlawful organization until April 12, 2005.

The Israeli materials that Mr. Fariz received are in Hebrew and Arabic. Mr. Fariz has already addressed his concerns relating to his ability to translate, review, and investigate the Israeli materials given the rate at which they were produced. (Doc. 1037). This alleged overt act is but an example of the prejudice that Mr. Fariz's defense has suffered because of the government's delayed production.

[4] As a further example, on September 21, 2004, the government added to the superseding indictment Overt Act 2, alleging that Nidal Zalloum was associated with the PIJ and perpetrated an attack killing two people. (Doc. 636 at 16 (Overt Act 2)). The government produced the statements of Nidal Zalloum in December 2004, and an English-language translation of his statement on February 18, 2005. While the government also provided the defense with a copy of an indictment charging Mr. Zalloum with being a member of Islamic Jihad, his statement suggests that he was acting alone, on his own impulses, and not because he was a PIJ member or was acting on their behest. Unfortunately, because Mr. Fariz did not have these materials when his defense team traveled to the Middle East, further investigation of this attack has also been delayed.

sufficient notice of his statement so that the appropriate steps could have been taken, through the U.S. and Israeli governments, to make this witness, as well as the other individuals being held by the Israeli government alleged to be involved in the attacks, available to the defense. The production of this statement has changed the defense's approach to the attacks evidence entirely.

12. The government apparently recognizes that the statement is *Brady* material, since they disclosed it with their production of *Brady*, *Giglio*, and other required disclosures on April 18, 2005.

13. Because this *Brady* material has been provided at such a late date, Mr. Fariz requests that the Court preclude any introduction into evidence of the alleged attacks, including Overt Act 14. Given that the government specifically delayed providing a statement that the prosecution team itself had taken, and has otherwise delayed production of the Israeli evidence, Mr. Fariz's ability to defend against the alleged attacks in this case has been seriously jeopardized.

14. Should the Court not entirely preclude the evidence, Mr. Fariz would alternatively request that the introduction into evidence of the alleged attacks be significantly delayed so that Mr. Fariz may conduct additional investigation concerning the alleged attacks.[5] If the government intends to proceed chronologically, it is unlikely that the defense

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[5] This request is made in conjunction with (1) Mr. Fariz's trial plan request, in which Mr. Fariz suggested an order of proof that would first address whether the Defendants before the Court had been knowing and willful participants in conspiracies to murder, before introducing evidence of any alleged attacks (Doc. 982), and (2) Mr. Fariz's request for discovery relief

will have completed its investigation of this overt act given the late production of this statement.

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Brady material must be provided to the defense in time for the material to be effectively used. *United States v. Bueno-Sierra*, 99 F.3d 375, 379 (11th Cir. 1996). This Court, moreover, has the discretion to enforce its discovery orders. *See United States v. Euceda-Hernandez*, 768 F.2d 1307, 1311-12 (11th Cir. 1985); *United States v. Campagnuolo*, 592 F.2d 852, 858 (5th Cir. 1979). The Eleventh Circuit has indicated that the Court should "weigh several factors, and, if it decides a sanction is in order, should fashion 'the least severe sanction that will accomplish the desired result – prompt and full compliance with the court's discovery orders.'" *Euceda-Hernandez*, 768 F.2d at 1312 (citations omitted). The Court should consider, *inter alia*, the following factors: "the reasons for the Government's delay in affording the required discovery, the extent of prejudice, if any, the defendant has suffered because of the delay, and the feasibility of curing such prejudice by granting a continuance or, if the jury has been sworn and the trial has begun, a recess." *Id.* (citations omitted); *see also Bueno-Sierra*, 99 F.3d at 379-80 ("Although we do not condone the prosecutor's actions [of withholding *Brady* material], the trial court's actions in the instant case [of recessing to allowing time to review inconsistent statements of witness] cured any alleged violation of the prosecutor's disclosure duties.").

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concerning the Israel evidence, because of its delayed production (Doc. 1037).

The statement made to the AUSA and case agent in this case was not known to the defense prior to its production on April 18, 2005. *Cf. Euceda-Hernandez*, 768 F.2d at 1312-13. Moreover, the government was aware of the statement for over a year and a half before producing the statement to the defense. *See Campagnuolo*, 592 F.2d at 858 (upholding suppression of statement of defendant denying knowledge of gambling slips that government had taken in 1973 but did not disclose to defense until day before trial in 1978).

The over one-and-a-half year delay in producing this *Brady* material prejudices the defense, since the information has been provided in an insufficient amount of time to use the information effectively. The delay in the production of this statement is particularly problematic given the likely use of the attack in this case. Specifically, the government has certainly included this alleged attack in the indictment in an attempt to tie the attack to the PIJ (Overt Act 14) and to Dr. Al-Arian who, over a year later, allegedly caused wire transfers to be sent to family members of the individuals involved in the attack (Overt Act 27). Whether (or not) an alleged attacker was a member of the PIJ at the time of the case is the critical link that the government is relying on to prove culpability on the part of Mr. Fariz and the other three Defendants as alleged members of the PIJ Enterprise. If the individuals did not commit the attack as members of the PIJ, that link is broken. Mr. Fariz therefore questions the timing of the government's production of this statement so close to trial, and requests that this Court preclude the introduction of any evidence concerning the alleged attacks, particularly concerning Overt Act 14.

Should the Court not entirely preclude the introduction of the attacks evidence, Mr. Fariz would alternatively request that the government be required to delay its presentation of any attacks evidence. The government has argued to the Court that it wishes to proceed chronologically, meaning that the government will likely reach alleged Overt Act 14 relatively early in its case. Unfortunately, because of the (1) government's prolonged production of the Israeli materials (as more fully addressed in Doc. 1037, incorporated herein by reference), and (2) late disclosure of this individual's statement to the U.S. government, the defense will not be able to complete its investigation of this attack. Mr. Fariz is further concerned about the allegations concerning the association of other alleged attackers to the PIJ.[6] Mr. Fariz would therefore alternatively request that the government's presentation of any attacks evidence be delayed so that Mr. Fariz may conduct further investigation.

[6] Mr. Fariz would note that Overt Acts 2 and 3 pertain to alleged PIJ attacks as well, meaning that the government will likely seek to begin its case with alleged PIJ attacks. *See* note 4, *supra* (discussing Overt Act 2).

WHEREFORE, Defendant Hatem Naji Fariz respectfully requests that this Honorable Court preclude, or delay, the admission of any evidence concerning the alleged attacks, including but not limited to Overt Act 14.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May, 2005, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Alexis L. Collins, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ M. Allison Guagliardo
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Assistant Federal Public Defender